The Pantry Restaurant *and* Hotel Employees and Restaurant Employees Union, Local 360, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO, CLC. Case 19–CA–28663

February 19, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint.[1]

Upon a charge and an amended charge filed by the Union on May 15 and July 22, 2003, respectively, the General Counsel issued a complaint on August 26, 2003, against The Pantry Restaurant, the Respondent, alleging that it had violated Section 8(a)(5) and (1) of the Act. Copies of the charge and the complaint were properly served on the Respondent. Following receipt of a 1-week extension of time to file an answer, on September 16, 2003, the Respondent faxed a letter to the General Counsel, including a copy of its 2002 tax return and a contract proposal that the Respondent had sent the Union in 2002.

On October 16, 2003, the General Counsel filed a Motion for Default Judgment, with exhibits attached. The General Counsel asserts, among other things, that the Respondent's September 16 submission did not constitute a proper answer to the complaint under Section 102.20 of the Board's Rules and Regulations because it neither specifically admitted, denied, or explained each of the facts alleged in the complaint, nor addressed any of the factual or legal allegations of the complaint. On October 20, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause as to why the motion should not be granted. The Respondent filed no response. The allegations in the motion are, therefore, undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The complaint alleges that the Respondent and the Union had a collective-bargaining agreement effective July 1, 1996, through July 1, 1999, or alternatively July 1, 1996, through January 1, 2001, covering unit employees. Further, paragraphs 6 and 7 of the complaint allege that:

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(a) Since approximately January 22, 2003, and continuing to date, the Employer has ceased paying, and has been refusing to pay, the holiday pay benefit to Unit employees when they work on holidays.

(b) Since approximately January 22, 2003, and continuing to date, the Employer has ceased paying, and has been refusing to pay, the vacation pay benefit to Unit employees.

(c) The subjects set forth in paragraphs 6(a) and 6(b) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(d) Respondent engaged in the conduct described above in paragraphs 6(a) and 6(b) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and/or the effects of this conduct.

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By the acts described above in paragraph 6, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

On September 5, 2003, the Respondent faxed a letter to the General Counsel requesting an extension of time in which to file an answer. The General Counsel granted the Respondent a 1-week extension of time to file an answer. On September 16, 2003, the Respondent faxed a letter to the General Counsel, including a copy of its 2002 tax return and a contract proposal that the Respondent had sent the Union in 2002. The letter in pertinent part stated:

> According to this information the contract should have been expired.
>
> Please review the income statement, and notice this case if not dismissed could result in a large loss of revenue for the city, state, and federal government, as well as adding to the un-employment rate in Cowlitz County.

The Respondent is apparently representing itself pro se. In determining whether to grant Motions for Summary Judgment, the Board has, as a general matter, shown leniency to respondents who proceed without benefit of counsel. *Kenco Electric & Signs*, 325 NLRB 1118 (1998). Thus, the Board will generally not preclude determination on the merits of the complaint if it

[1] Inasmuch as, for the reasons set forth below, we find that the Respondent did file an answer, we construe the General Counsel's motion as a Motion for Summary Judgment.

finds that a pro se respondent has filed a timely answer, which can reasonably be construed as denying the substance of the complaint allegations. *Harborview Electric Construction Co.*, 315 NLRB 301 (1994).

The complaint alleges that the Respondent unilaterally ceased paying holiday and vacation pay. The Respondent's letter does not contest any of the factual allegations of the complaint. However, it raises the defense that its contract with the Union had expired. It also raises as a defense the asserted fact that the findings of violations could result in unemployment of unit employees. We, therefore, find that the Respondent's letter can be reasonably be construed as a proper answer under the Board's Rules and Regulations. However, the Respondent's statements are legally insufficient to rebut the allegations of the complaint and do not otherwise raise any material issue of fact or law that would warrant a hearing in this case.

The Respondent raises the defense that the contract has expired. As the complaint alleges, however, the failure to make holiday and vacation payments without bargaining to impasse is a unilateral change in a mandatory subject of bargaining.[2] The Board has long held that terms and conditions of employment (like those involved here) established in a collective-bargaining agreement survive expiration of the contract and cannot be changed by the employer without first bargaining to impasse with the union. *NLRB v. Katz*, 369 U.S. 736 (1962); *Hen House Market No. 3*, 175 NLRB 596, 602 (1969), enfd. 428 F.2d 133 (8th Cir. 1970) (unilateral change in contractually provided health benefit plan after contract expiration violates Section 8(a)(5)).

With respect to the other affirmative defense that unemployment will result if the case is not dismissed, we conclude that the possibility of unemployment is not a valid defense to the 8(a)(5) allegations in this case. Further, even if we construe the defense as an inability to pay, it would not be a valid defense. It is well established that financial inability to pay is not a defense to a charge that the Employer violated Section 8(a)(5) of the Act. *Convergence Communications, Inc.*, 339 NLRB No. 56 (2003). Consequently the reasons proffered by the Respondent for unilaterally ceasing to make the payments are legally insufficient answers to the complaint's allegations in paragraphs 6 and 7.

Therefore, we grant summary judgment in favor of the General Counsel. Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to pay holiday and vacation pay without affording the Union an opportunity to bargain about these changes and the effects of these changes as alleged in the complaint.

[2] Complaint par. 5 alleges that the collective-bargaining agreement had expired.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Longview, Washington, is engaged in the business of operating a restaurant. During the 12-month period preceding issuance of the complaint, the Respondent in the course and conduct of its business operations had gross sales of goods and services valued in excess of $500,000. During this same period, the Respondent purchased and delivered to its facilities within the State of Washington, goods and materials valued in excess of $5000 directly from sources outside the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that Hotel Employees and Restaurant Employees Union, Local 360, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Stephen Long held the position of the Respondent's president and owner, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and is an agent acting on behalf of the Respondent within the meaning of Section 2(13) of the Act.

The employees of the Respondent, as described in the collective-bargaining agreement between the Respondent and the Union effective by its terms from July 1, 1996, through July 1, 1999, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Alternatively, the employees of the Respondent, as described in the collective-bargaining agreement between the Respondent and the Union effective by its terms from July 1, 1996, through January 1, 2001, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all material times, the Union has been the exclusive collective-bargaining representative of the unit based on Section 9(a) of the Act. The Respondent and the Union were parties to successive collective-bargaining agreements, the most recent of which was effective from July 1, 1996, through July 1, 1999, or alternatively July 1, 1996, through January 1, 2001.

Since approximately January 22, 2003, and continuing to date, the Employer has ceased paying, and has been

refusing to pay, the holiday benefit to unit employees when they work on holidays. Also, since approximately January 22, 2003, and continuing to date, the Employer has ceased paying, and has been refusing to pay, the vacation pay benefit to unit employees. The holiday benefit and vacation pay relate to wages, hours, and other terms and conditions of employment of unit employees and are mandatory subjects for the purposes of collective bargaining. The Respondent ceased paying holiday and vacation pay to unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to these changes and/or the effects of these changes. We find that by the conduct described above the Respondent has failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By unilaterally ceasing to pay holiday and vacation pay to unit employees, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully ceased to pay holiday and vacation pay to bargaining unit employees, the Respondent is ordered to restore the status quo that existed just prior to its unlawful change, and to make the unit employees whole for any losses they may have suffered as a result of the Respondent's unlawful failure to pay them holiday and vacation pay, computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders the Respondent, The Pantry Restaurant, Longview, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union as the collective-bargaining representative of the unit, by failing and refusing to make holiday and vacation payments. The appropriate unit is employees, as described in the collective-bargaining agreement between the Union and the Respondent, which was effective by its terms from July 1, 1996, through July 1, 1996, or, alternatively, through July 1, 2001.

(b) Unilaterally ceasing to pay holiday and vacation pay to its unit employees without first notifying the Union and affording it an opportunity to bargain about these changes and the effects of these changes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the status quo that existed just prior to its unilaterally ceasing to pay holiday and vacation pay on January 22, 2003, until the Respondent bargains with the Union in good faith to an agreement or to an impasse.

(b) Make whole unit employees by paying them the holiday and vacation pay due them since January 22, 2003, with interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Longview, Washington, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 22, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 19, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Hotel Employees and Restaurant Employees Union, Local 360, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO, CLC (the Union) as the exclusive bargaining representative of the unit, by failing and refusing to make holiday and vacation payments. The appropriate unit is our employees, as described in the collective-bargaining agreement between the Union and us, which was effective by its terms from July 1, 1996, through July 1, 1996, or, alternatively, through July 1, 2001.

WE WILL NOT unilaterally cease to pay holiday pay and vacation pay to our bargaining unit employees without first notifying the Union and affording it an opportunity to bargain about the changes and the effects of the changes.

WE WILL NOT in like or related manner interfere with, restrain or coerce you in the exercise of the rights set forth above.

WE WILL restore the status quo that existed just prior to our unilaterally ceasing to pay holiday pay and vacation pay on January 22, 2003, until we have bargained with the Union in good faith to an agreement or to an impasse.

WE WILL make whole our unit employees by paying them holiday pay and vacation pay due them since January 22, 2003, with interest.

THE PANTRY RESTAURANT